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ABSTRACT

This report summarizes and analyzes two court decisions relating to State aid to nonpublic schools. In a Pennsylvania case, a Federal district court allowed public tax money to be used to supplement nonpublic school teachers' salaries. In the other case, that of Rhode Island, the Federal court ruled the State law to supplement private school teachers' salaries unconstitutional and in violation of the Establishment Clause of the First Amendment of the United States Constitution. After analyzing these cases, the author suggests that only a United States Supreme Court decision can clear up the uncertainty surrounding State supplements to nonpublic school teachers' salaries. (Author/JF)

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By Dr. Don Moran
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Kansas Association of School Boards

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Editor's Comment

State Aid to Nonpublic Schools: An Analysis of Recent Court Decisions

"It appears that the state aid to nonpublic schools question .....rests on the horns of a dilemma." So concludes, Dr. Don Moran in his summary of recent court decisions concerning state aid to nonpublic schools.

Research Reports in Educational Administration is pleased to publish this article by Dr. Moran. The article was first published in the January, 1971 First Quarter issue of the Kansas School Boards Journal.

We think that the article is of particular interest in Colorado education where the issue of state aid to nonpublic schools will be met in the very short term.

Dr. Moran received his doctorate from Kansas University, Lawrence, Kansas. He is currently Assistant Executive Director of the Kansas Association of School Boards. Dr. Moran is also editor of NOLPE NOTES, a publication of the National Organization on Legal Problems in Education. Dr. Moran would welcome inquiries about this article directed to KASB, 825 Western Avenue, Topeka, Kansas 66606.

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The Editor

James Rose

STATE AID TO NONPUBLIC SCHOOLS
An Analysis of Recent Court Decisions

by
Dr. Don Moran

In order to provide readers with some background on the state aid to nonpublic schools controversy, this article will summarize and analyze two court decisions on the issue at hand which were settled recently in Pennsylvania and Rhode Island. In one instance, Pennsylvania, a federal district court allowed public tax money to be used to supplement nonpublic school teacher's salaries. In the other case, that of Rhode Island, the federal court ruled the state law to supplement private school teacher's salaries unconstitutional and in violation of the Establishment Clause of the First Amendment of the United States Constitution. Two other cases, one arising out of Connecticut and the other from Louisiana, have also been decided recently. Both of these latter decisions ruled the appropriate state laws unconstitutional; however, these cases have not yet been reported and copies of their decisions are not available for review at this time.

The legal history of the Church-State controversy is a very long one; indeed, it predates the Constitution of the United States. One of the major reasons for early immigration to this country was for

religious freedom - freedom from a state imposed religion and freedom from a state prohibited religion. Early efforts in this country to successfully separate the state from the church were confined mainly to Jefferson and Madison who fought valiantly in the late Eighteenth Century to safeguard the very religious freedom which the early settlers sought when they came to America. In Madison's Remonstrance and Jefferson's declaration in the Virginia Statute for Establishing Religious Freedom, religion was separated from government in that civil power was never in any way to restrain or support the wholly private matter of religion. The denial or abridgment of religious freedom was indeed a violation of both conscience and of natural equality. The arguments of Madison and Jefferson prevailed and are today reflected in the First Amendment of the Constitution of the United States. The First Amendment's religious clause reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." The First Amendment is made applicable to the states through the Fourteenth Amendment.

A landmark case, Cochran v. Louisiana State Board of Education[1], (1930), allowed the states, under the Fourteenth Amendment of the United States Constitution, to use public tax money to supply textbooks to all school children, both public and private. The Cochran case established an important precedent in the field of Church-State relationships when it said:

> True, these children attend some school public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for the use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.

The "child-benefit" doctrine was thus born. While Cochran was settled under the Fourteenth Amendment and while no religious basis was used in deciding the issue of free textbooks, an important legal concept emerged to be expanded under the First Amendment in Everson v. Board of Education.[2]

Everson v. Board of Education was decided by the United States Supreme Court in 1947, and in its decision, the Court said that "the First Amendment prohibited governmental aid or assistance to any and all religions...Neither can pass laws that aid one religion, aid all religions or prefer one religion over another...Neither can force nor influence a person to go to or to remain away from church...or force him to profess a belief or disbelief in any religion...No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." To paraphrase the words of Jefferson, the First Amendment's religious clauses were intended to erect a wall of separation between church and state.

Despite the Court's emphasis on the erection of a wall of separation, the Court in Everson found the New Jersey law allowing public funds to be used to transport private school children constitutional. The Court said that the New Jersey law was designed to promote the welfare of the child, not to aid or establish a religion. From the Cochran and Everson cases, then, evolved the legal rule known as the "child-benefit" doctrine.

The "child-benefit" doctrine has played an important role in the settling of various cases testing the constitutionality of state

laws affecting the religious clauses of the First Amendment of the United States Constitution. Most recently, in a United States Supreme Court case, Board of Education v. Allen,[3] (1968), the Court reaffirmed the "child-benefit" doctrine in finding a New York law constitutional which required the state to lend textbooks free of charge to all children in private sectarian and nonsectarian schools.[4]

The problem facing the Court in cases of this sort is determining what is state aid to a religion and what is not state aid. The problem, like other problems in constitutional law, is one of degree. It is a very fine line. To resolve this thorny issue, the Supreme Court, in a 1963 Church-State case, Abington School District v. Schempp,[5] laid down the following rule:

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say, that to withstand the strictures of the Establishment Clause, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. 374 U.S. at 222.

Thus the key issue rests in the legislative intent of the proposed law. Does the proposed law have as a "primary purpose" aid to the educational opportunities of the child and will the "primary effect" of the proposed law advance or inhibit religion? The answers to these two basic questions holds the key to the constitutionality of a state statute under the United States Constitution.

In Pennsylvania, a group of parents challenged a recently enacted state law that empowered the Superintendent of Public Instruction to enter into contracts for the purchase of "secular educational services"

from nonpublic schools in the state. The language in H.B. 1540 and H.B. 2006 closely paralleled the Pennsylvania law. The case in question, Lemon v. Kurtzman, was found to be constitutional by a three judge federal court panel by a 2-1 margin.

The major question of law placed before the panel of federal judges was whether the "purpose or primary effect" of the Pennsylvania law was to advance or inhibit religion.

The court maintained that nonpublic schools pursue two goals, religious instruction and secular education. State aid to pure secular education could not be construed as aid to sectarian education or religious instruction. In satisfying the standard of "purpose and primary effect," the Court said the law itself specifically stated that aid was to be given for a limited number of secular subjects peculiarly unconnected with and unrelated to the teaching of religious doctrines. In other words, the law maintained a strict neutrality between church and state.

Another important argument used by the Lemon Court was that nonpublic schools, whether religious or otherwise, perform a significant public service by educating a great number of children. These children, even though educated in secular subjects in a religious atmosphere, take their place in a secular society and work for the common good. The overlapping of the State's concern in the individual's well being and the concerns of religion sometimes touch the same activities. This overlap is permissible only when the activity of the state is well defined and restricted, but even then the mutual concern of the state and the concern of religion in education must at times mesh. If this overlap was prohibited, it was argued, that the state could not legally provide religious institutions with police or fire protection.

In a dissenting opinion, Justice Hastie argued that the primary purpose for which sectarian schools exist is religious. Nothing can separate the fact that sectarian schools educate children in a separate religious environment. Secular subjects are taught in a sectarian manner and aid to one is aid to the other.

Perhaps the most important point made in dissent by Justie Hastie was that if state aid were allowed to nonpublic schools, church authorities of all religious groups regardless of belief would be compelled to seek such aid from the state to maintain themselves as integral units and to insist that state and local governments contribute liberally to their sectarian enterprises. The other side of the coin, according to Justice Hastie, was the "inevitability of state intrusion into the affairs of organized religion in the administration of the ... laws of the state." By accepting state aid, the church will, by necessity, "accept state inspection, monitoring and investigation of instruction and academic organization." By allowing the Pennsylvania law to stand as constitutional, according to Justice Hastie, the wall of separation between church and state has been toppled.

In Rhode Island, a state law providing for the payment of state funds to teachers of secular subjects in nonpublic elementary schools was declared unconstitutional by a three judge federal district panel. The case, DiCenso v. Robinson,[6] was very similar to the Lemon case previously discussed. The language contained in Rhode Island's law also coincided closely with H.B. 1540 and 2006. The federal court found in the Rhode Island case that the private school system of the Roman Catholic Church" is an integral part of the religious mission of

the ... Church." ... and "it is also clear that this essentially religious enterprise cannot succeed without good teaching in secular subjects." The court found that state aid to sectarian schools "will have the significant if temporary secular effect of aiding the quality of secular education in Rhode Island's Roman Catholic elementary schools" ... and it is "equally clear that the Act gives significant aid to a religious enterprise."

The thrust of the DiCenso case is that the "purpose and primary effect" test laid down by the United States Supreme Court in the Schempp case in 1963 is no longer valid. To determine a Church-State controversy in relation to the Schempp standard, requires an effort "no more satisfactory than efforts to rank the legs of a table in order of importance."

A new test set down by the United States Supreme Court in a New York case, Walz v. Tax Commission of New York City,[7] was found to be more acceptable by the federal district court in the DiCenso case. This text, written by Chief Justice Burger, reads as follows:

> Each value judgment under the Religion Clauses must turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.

The Walz test swept aside the implications of the Schempp test that the "single predominant effect of a statute may be isolated by a process of deductive reasoning based on principle and precedent." Instead, the key words are now "excessive entanglement." The basic argument found in Cochran, Everson, Allen and the Lemon case, ie., the "child-benefit" doctrine, was rejected and the dissent by Justice Hastie in the Lemon case was accepted and enlarged upon.

As you recall, Justice Hastie pointed out "private conduct which is heavily subsidized by the state may be viewed as state action and subjected to the same standards of impartiality which we demand of the government." Therefore, significant state aid, under the weight of the argument, will inevitably produce major state limitations on the freedom of denominational schools. As Chief Burger said:

> (T) he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards...

Religious institutions, according to the Court in DiCenso, would not be in favor of the degree of "entanglement" as noted in Justice Hastie's dissent in the Lemon case or as outlined in the Walz case by Chief Justice Burger. By winning the First Amendment battle to allow state aid the overpowering evil of the Church becoming "public" at some state of the process would be too much for it to accept. By winning an Establishment Clause victory, the Church would, because of excessive government entanglements, abandon the Free Exercise Clause.

It thus appears that the state aid to nonpublic schools question, which takes the form of teacher salary supplements for those who teach secular subjects, rests on the horns of a dilemma. One state has found such state assistance constitutional on the basis of the "child-benefit" doctrine, while a more recent decision found a similar law in another state unconstitutional on the grounds of "excessive governmental entanglements." The argument rages on, hopefully to be settled by the United States Supreme Court in the very near future.

EDITOR'S NOTE:

The decisions of Johnson v. Sanders, USDC Connecticut, number 13432 and Seegers v. Parker, S.C. Louisiana, number 50870, were received after the publication deadline for this article. Essentially, however, state aid to "purchase secular educational services" from nonpublic schools was declared unconstitutional for the same reasons found in the DiCenso case. However, the Louisiana case, Seegers v. Parker, was found unconstitutional under the Louisiana State Constitution, which is more restrictive in nature than the Federal Constitution. (See note number 4 for additional information concerning a comparison of state constitutional provisions and the First Amendment of the United States Constitution.)

FOOTNOTES

1. Cochran et al v. Louisiana State Board of Education et al, 281 U.S. 370 (1930).
2. Everson v. Board of Education of the Township of Ewing et al, 330 U.S. 1 (1947).
3. Board of Education v. Allen, 392 U.S. 336 (1968).
4. NOTE: It must be remembered that many state constitutions are much more restrictive than the Federal Constitution. For example: many states prohibit outright the use of public tax money to transport nonpublic school children while the Federal Constitution under the First Amendment (Everson v. Board of Education) specifically allows states to engage in this activity. Michigan, as a further example, passed a constitutional amendment November 3, 1970, that "prohibits (a) use of public funds to aid any nonpublic elementary or secondary school; (b) prohibits use of public funds, except for transportation, to support the attendance of any students or the employment of any person at nonpublic schools or at any other location or institution where instruction is offered in whole or in part to nonpublic students; (c) prohibits any payment, credit, tax benefit, exemption or deduction, tuition voucher, subsidy, grant, or loan of public monies or property, directly or indirectly, for the above purposes."
5. Abington School District v. Schempp, 374 U.S. 203 (1963).
6. DiCenso et al v. Robinson et al, U.S.D.C. Rhose Island, Case number 4239, dated June 15, 1970.
7. Walz v. Tax Commission of New York City, 38 U.S.L.W. 4347 (1970).

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